Kok Wah Kuan v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W–05–69 OF 2003
GOPAL SRI RAM, ZULKEFLI AND RAUS SHARIF JJCA
12 JUNE 2007

Constitutional Law — Constitution — Infringement of — Separation of power — Whether doctrine of separation of powers an integral part of Constitution — Whether section that vests judicial power of punishment in executive violates separation of power between executive and judiciary — Federal Constitution art 121 — Child Act 2001 s 97(2)

Constitutional Law — Executive — Yang di-Pertuan Agong — Separation of power — Whether doctrine of separation of powers an integral part of Constitution — Whether section that vests judicial power of punishment in executive violates separation of power between executive and judiciary — Federal Constitution art 121 — Child Act 2001 s 97(2)

Constitutional Law — Legislation — Validity of impugned legislation — Separation of power — Whether doctrine of separation of powers an integral part of Constitution — Whether section that vest judicial power of punishment in executive violates separation of power between executive and judiciary — Federal Constitution art 121 — Child Act 2001 s 97(2)

Criminal Procedure — Sentence — Juvenile offender — Detention during pleasure of Yang di-Pertuan Agong — Whether section that vests judicial power of punishment in executive violates separation of power between executive and judiciary — Federal Constitution art 121 — Child Act 2001 s 97(2)

The appellant was convicted for murder, committed when he was 12 years and 9 months old. His conviction was entered on 1 July 2003 and he was ordered to be detained during the pleasure of the Yang di-Pertuan Agong pursuant to s 97(2) of the Child Act 2001. The appellant argued that s 97 is ultra vires the Federal Constitution in that it violates the doctrine of separation of powers housed in the supreme law. The argument was that the power to impose punishment in a criminal case is a judicial power. What s 97 does, according to learned counsel for the appellant, is to vest this judicial power of punishment in the Executive arm of the Federation. Two issues therefore arise out of the appellant's complaint, ie: (1) whether the doctrine of separation of powers is an integral part of the Constitution; and (2) whether s 97 in pith and substance violates that doctrine. It was also pointed out during argument that there may be other statutes, eg s 348 of the Criminal Procedure

Code, which makes provision for the detention of persons at the pleasure of the Yang di-Pertuan Agong, or a Ruler or Governor. It was said that striking down s 97(2) may affect those other provisions.

Held, dismissing the appeal:

(1) By Act A704, art 121 was amended with effect from 10 June 1988 and the expression 'judicial power' was deleted. No challenge as to the constitutionality of Act A704 was ever taken before any court. Such a challenge, even if taken, would have failed because the amendment did not have the effect of divesting the courts of the judicial power of the Federation. There are two reasons for this. First, the amending Act did nothing to vest the judicial power in some arm of the Federation other than the courts. Neither did it provide for the sharing of the judicial power with the Executive or Parliament or both those arms of Government. Second, the marginal note to art 121 was not amended. This clearly expresses the intention of Parliament not to divest the ordinary courts of the judicial power of the Federation and to transfer it to or share it with either the Executive or the Legislature (see para 4). Therefore it is beyond argument that the doctrine of separation of powers is very much an integral part of the Federal Constitution. Since art 4(1) declares the Constitution to be the supreme law, it follows that any State action that violates the doctrine of separation of powers must be struck down as unconstitutional (see para 8).

(2) Section 97(2) clearly contravenes the doctrine of separation of powers housed in the Constitution by consigning to the Executive the judicial power to determine the measure of the sentence that was to be served by the appellant. Section 97(4) did not rescue the second subsection from unconstitutionality. If anything it compounds the problem. For, that subsection did in fact confirm that it is the Yang di-Pertuan Agong who determines the measure of the sentence that is to be served, save that it is a power that is exercised on the advice of a Board of Visiting Justices. Hence s 97(4) is merely a procedural adjunct to the principal power to determine the measure of the sentence that the appellant was to serve (see para 13).

(3) The conclusion that s 97(2) was inconsistent with the Constitution did not extend to a declaration of unconstitutionality of other equipollent provisions. The validity of these other provisions must be dealt with on a case by case basis as and when the occasion arises (see para 14).

(4) This was a case in which Parliament had provided for the entry of a conviction and passing of sentence but had made no valid law for the measure of sentence (see para 16). Therefore, the conviction was upheld in this case but the sentence must be set aside (see para 18).

[Bahasa Malaysia summary

Perayu telah disabitkan kerana kesalahan membunuh yang dilakukan semasa beliau berumur 12 tahun 9 bulan. Sabitannya telah dimasukkan pada 1 Julai 2003 dan beliau telah diperintahkan untuk ditahan di atas kehendak Yang di-Pertuan Agong

menurut s 97(2) Akta Kanak-Kanak 2001. Perayu berhujah bahawa s 97 adalah ultra vires Perlembagaan Persekutuan kerana ia mencabuli doktrin pengasingan kuasa yang termaktub dalam undang-undang tertinggi. Penghujahan adalah bahawa kuasa untuk mengenakan hukuman dalam satu kes jenayah adalah satu kuasa kehakiman. Apa yang s 97 lakukan, menurut peguam bijaksana bagi pihak perayu, adalah untuk memberikan kuasa kehakiman untuk hukuman kepada badan Eksekutif Persekutuan. Dua persoalan ditimbulkan berdasarkan aduan perayu: iaitu (1) sama ada doktrin pengasingan kuasa merupakan keseluruhan Perlembagaan; dan (2) sama ada s 97 secara inti pati mencabuli doktrin tersebut. Juga dikemukakan semasa penghujahan bahawa mungkin terdapat statut-statut lain, contohnya s 348 Kanun Acara Jenayah, yang memperuntukkan untuk penahanan seseorang di atas kehendak Yang di-Pertuan Agong, atau seorang pemerintah atau Gabenor. Adalah dikatakan bahawa pembatalan s 97(2) mungkin menjejaskan peruntukan lain.

Diputuskan, menolak rayuan tersebut:

(1) Melalui Akta A704, perkara 121 telah dipinda berkuat kuasa daripada 10 Jun 1988 dan ungkapan 'judicial power' telah dipotong. Tiada cabaran terhadap keperlembagaan Akta A704 dikemukakan di hadapan mana-mana mahkamah. Cabaran sedemikian, sekiranya dikemukakan, akan gagal kerana pindaan tersebut tidak mempunyai kesan pelucutan kuasa kehakiman Persekutuan daripada mahkamah-mahkamah. Terdapat dua alasan untuk ini. Pertama, Akta pindaan tidak berbuat apa-apa untuk memberikan kuasa kehakiman pada badan Persekutuan selain daripada mahkamah. Bahkan ia tidak memperuntukkan perkongsian kuasa kehakiman dengan badan Eksekutif atau Parlimen atau kedua-dua badan Kerajaan tersebut. Keduanya, nota kaki kepada perkara 121 tidak dipinda. Ini dengan jelas menyatakan niat Parlimen untuk tidak melucutkan kuasa kehakiman Persekutuan daripada mahkamah biasa dan untuk memindahkannya atau berkongsinya dengan sama ada badan Eksekutif atau badan Perundangan (lihat perenggan 4). Oleh itu tidak boleh dihujahkan lagi bahawa doktrin pengasingan kuasa sememangnya sebahagian menyeluruh Perlembagaan Persekutuan. Memandangkan perkara 4(1) mengisytiharkan Perlembagaan adalah undang-undang tertinggi, adalah diikut bahawa mana-mana tindakan Negeri yang mencabuli doktrin pengasingan kuasa hendaklah dibatalkan sebagai tidak berperlembagaan (lihat perenggan 8).

(2) Seksyen 97(2) jelas bertentangan dengan doktrin pengasingan kuasa yang termaktub dalam Perlembagaan dengan mengamanatkan badan Eksekutif kuasa kehakiman untuk menentukan tempoh hukuman yang dikenakan ke atas perayu. Seksyen 97(4) tidak menyelamatkan subseksyen kedua daripada bersifat tidak berperlembagaan. Apapun ia bersetuju dengan masalah tersebut. Ini adalah kerana subseksyen tersebut sememangnya mengesahkan bahawa adalah Yang di-Pertuan Agong yang menentukan tempoh hukuman yang patut dikenakan, kecuali ianya kuasa yang digunakan atas nasihat Lembaga Hakim-Hakim Yang Melawat. Justeru itu, s 97(4) hanyalah satu prosedur tambahan kepada kuasa utama untuk menentukan tempoh hukuman yang perayu patut dikenakan (lihat perenggan 13).

(3) Kesimpulan bahawa s 97(2) tidak konsisten dengan Perlembagaan bukan satu deklarasi ketidakberperlembagaan peruntukan-peruntukan lain. Kesahan peruntukan-peruntukan lain tersebut hendaklah dibicarakan mengikut kes masing-masing apabila keadaan tersebut timbul (lihat perenggan 14).

(4) Ini merupakan satu kes di mana Parlimen telah memperuntukkan kemasukan satu sabitan dan menjatuhkan hukuman tetapi tidak menggubal undang-undang sah untuk tempoh hukuman (lihat perenggan 16). Oleh demikian, sabitan tersebut dikekalkan dalam kes ini tetapi hukuman hendaklah diketepikan (lihat perenggan 18).]

Notes

For a case on validity of impugned legislation, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1931.

For cases on infringement of the constitution, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1653–1654.

For cases on juvenile offenders, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3555–3557.

For cases on Yang di-Pertuan Agong, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1738–1739.

Cases referred to

Assa Singh v Menteri Besar, Johore [1969] 2 MLJ 30 (refd)
Bengal Immunity Co Ltd v State of Bihar AIR [1955] SC 661 (refd)
Director of Public Prosecutions v Mollison [2003] UKPC 6 (refd)
Hinds v The Queen [1976] 1 All ER 353 (refd)
Huddart, Parker and Co Proprietary Ltd v Moorehead [1908–1909] 8 CLR 330 (refd)
Kerajaan Negeri Selangor & Ors v Sagong Tasi [2005] 6 MLJ 289 (refd)
Liyanage v The Queen [1967] 1 AC 259 (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311 9refd)
Shell Co of Australia Ltd v Federal Commissioner of Taxation [1931] AC 275 (refd)
Soon Kim Seng v PP [1978] 2 MLJ 107 (refd)
Special Courts Bill 1978, In re the AIR [1979] SC 478 (refd)
Sugumar Balakrishnan v Director of Immigration, State of Sabah & Anor [1998] 2 MLJ 217 (refd)
Surinder Singh Kanda v The Federation of Malaya [1962] MLJ 169 (refd)

Legislation referred to

Australian Constitution [Aust] s 71
Child Act 2001 ss 97(2), (4)
Criminal Procedure Code s 348
Federal Constitution arts 4(1), 39, 121
Juveniles Act 1951 [Jamaica] s 29(1)
Penal Code s 302

Appeal from: Criminal Trial No 45–27 of 2002 (High Court, Kuala Lumpur)

Karpal Singh (Ramkarpal Singh with him) (Karpal Singh & Co) for the first apellant.

Yaacob Sam (Mangai with him) (Attorney General's Chambers) for the respondent. A

Gopal Sri Ram JCA (delivering judgment of the court):

B

[1] The appellant before us was convicted of the offence of murder under s 302 of the Penal Code alleged to have been committed on 30 May 2002 in the Federal Territory of Kuala Lumpur. He was then 12 years and 9 months old. His conviction was entered on 1 July 2003 and he was ordered to be detained during the pleasure of the Yang di-Pertuan Agong pursuant to s 97(2) of the Child Act 2001. Section 97 reads as follows: C

(1) sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.

(2) In lieu of a sentence of death, the Court shall order a person convicted of an offence to be detained in a prison during the pleasure of: D

(a) the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; or

(b) the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State. E

(3) If the Court makes an order under subsection (2) that person shall, notwithstanding anything in this Act:

(a) be liable to be detained in such prison and under such conditions as the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may direct; and

(b) while so detained, be deemed to be in lawful custody. F

(4) If a person is ordered to be detained at a prison under subsection (2), the Board of Visiting Justices for that prison:

(a) shall review that person's case at least once a year; and

(b) may recommend to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri on the early release or further detention of that person and the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may thereupon order him to be released or further detained, as the case may be. G

[2] The appellant now argues that s 97 is ultra vires the Federal Constitution in that it violates the doctrine of separation of powers housed in the supreme law. The argument is that the power to impose punishment in a criminal case is a judicial power. What s 97 does, according to learned counsel for the appellant, is to vest this judicial power of punishment in the executive arm of the federation. Two issues therefore arise out of the appellant's complaint. First, whether the doctrine of separation of powers is an integral part of the Constitution: second, whether s 97 in pith and substance violates that doctrine. H I

[3] Prior to 10 June 1988, art 121 of the Constitution opened with the words 'he judicial power of the Federation shall be vested'. This phrase was taken by the

framers of our Constitution from s 71 of the Australian Constitution. It was interpreted by Griffith CJ in *Huddart, Parker and Co Proprietary Ltd v Moorehead* [1908–1909] 8 CLR 330, to mean:

> ... the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision... is called upon to take action.

This definition was cited with approval by the Privy Council in *Shell Co of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275.

[4] However, by Act A704, art 121 was amended with effect from 10 June 1988 and the expression 'judicial powe' was deleted. No challenge as to the constitutionality of Act A704 was ever taken before any court. To our minds such a challenge, even if taken, would have failed because the amendment did not have the effect of divesting the courts of the judicial power of the Federation. There are two reasons for this. First, the amending Act did nothing to vest the judicial power in some arm of the Federation other than the courts. Neither did it provide for the sharing of the judicial power with the Executive or Parliament or both those arms of Government. Second, the marginal note to art 121 was not amended. This clearly expresses the intention of Parliament not to divest the ordinary courts of the judicial power of the Federation and to transfer it to or share it with either the Executive or the Legislature.

[5] Now, marginal notes are admissible guides to statutory interpretation. Indeed:

> It is now well settled that a marginal note is a part of the section. It is the key to open the mind of the legislature by affording guidance in understanding their intendment. See, *The Film Exhibitors Guild v State* AIR [1987] AP 110, per K Ramaswamy J on behalf of the Full Bench.

Of course, guidelines for statutory interpretation should not be applied when interpreting a Constitution. See, *Hinds v The Queen* [1976] 1 All ER 353, per Lord Diplock. But, a marginal note in a written Constitution is nevertheless part of the supreme law and 'furnishes some clue as to the meaning and purpose of the article'. See, *Bengal Immunity Co Ltd v State of Bihar* AIR [1955] SC 661, per Das, Ag CJ at para. 24.

[6] In *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289, this court said (at p 308):

> The Constitution of Sri Lanka (formerly Ceylon) does not even mention the expression judicial power. Yet, upon high authority it has been held that despite the omission, the provisions in that document:
>
> > ... manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power

> is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature (per Lord Pearce in*Liyanage v The Queen* [1967] 1 AC 259 at p 287).
>
> The Indian Constitution also does not make mention of judicial power being vested in the judiciary. Yet, the same position obtains there as in Sri Lanka. See *Minerva Mills Ltd v Union of India AIR* [1980] SC 1789. Like the Constitutions of Sri Lanka and India, the Federal Constitution preserves the separation of powers between the three arms of Government and evinces no intention that the judicial power of the Federation shall be passed to or shared with the Executive or the Legislature. It follows that the judicial power of the Federation remains where it has always been, namely, with the judiciary.

That is a view to which we still adhere.

[7] In *Hinds v The Queen*, Lord Diplock made two observations that are applicable to the case at hand. In the first place he said of the Jamaican Constitution that:

> It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government.

He then made this further observation:

> What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution: *Liyanage v The Queen* [1967] 1 AC 259, pp 287–288.

[8] Based on the foregoing discussion, it is in our judgment beyond argument that the doctrine of separation of powers is very much an integral part of the Federal Constitution. Since art 4(1) declares the Constitution to be the supreme law, it follows that any State action that violates the doctrine of separation of powers must be struck down as unconstitutional. And that brings us to the second issue that has fallen for determination.

[9] In support of his argument that s 97(2) violates the doctrine of separation of powers between the Executive and the Judiciary, learned counsel for the appellant relied on *Director of Public Prosecutions v Mollison* [2003] UKPC 6. The facts of that case were these. The accused, Mollison was convicted of the murder one Leila Brown during a robbery, an offence which, by the law of Jamaica carried the death penalty. However, as Mollison was 19 years at the date of his conviction the trial judge, acting under s 29(1) of the Juveniles Act 1951 of Jamaica, ordered detention during the Governor-General's pleasure. Subsections (1) and (4) of that section provided as follows:

> 1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Law, be liable to be detained in such place

A (including, save in the case of a child, an adult correctional centre) and under such conditions as the Minister may direct, and while so detained shall be deemed to be in legal custody.

4) The Governor-General may release on licence any person detained under subsection (1) or (3) of this section. Such licence shall be in such form and contain such conditions as the
B Governor-General may direct, and may at any time be revoked or varied by the Governor-General. Where such licence is revoked the person to whom it relates shall return forthwith to such place as the Governor-General may direct, and if he fails to do so may be arrested by any constable without warrant and taken to such place.

C **[10]** Mollison argued that s 29 was incompatible with the separation of judicial from executive power which he said was a fundamental principle upon which the Constitution of Jamaica was built. The argument found favour with the Privy Council. Lord Bingham of Cornhill who delivered the advice of the Board after having initially considered the accused's submission on the point ambitious nevertheless treated it as having already been settled by the Board's decision in Hinds.
D He also made the following observation of s 29 which, in our judgment, is the fulcrum upon which the case turned:

It is also a key feature of this sentence in Jamaica (although no longer in the United Kingdom) that the decision on release is entrusted to the Governor-General as a member of the executive. Section 29(4) of the Juveniles Act as amended has that express effect.
E This feature also has been clearly recognised: see *The State v O'Brien* [1973] IR 50 at pp 59–60, 64, 71–72; *R v Secretary of State, Ex p Venables* [1998] AC 407 at pp 498–499, 519–524, 530–532; *Browne v the Queen* [2000] 1 AC 45 at p 48; *V v United Kingdom* [1999] 30 EHRR 121, paras 11-0-111. Thus while, in a case falling within s 29(1), the judge sitting in court passes sentence, it falls to the executive to determine the measure of punishment which an individual detainee will undergo: *Hinds v The Queen* [1977] AC 195
F at pp 227–228. It is clear that such determination is for all legal and practical purposes a sentencing exercise: see *R (Anderson) v Secretary of State for the Home Department* [2002] 3 WLR 1800, pp 1812, 1822-1823, 1830, [2002] UKHL 46, paras 24, 52, 74 and the authorities there cited.

G **[11]** Two points emerge from the above-quoted passage. First, the power to pass sentence and the power to determine the measure of punishment are both part of the judicial power. Second, that s 29 consigned the latter power to the Executive. We may add that our courts have already held that the sentencing power is a judicial power. Thus in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311, Zakaria Yatim J
H (whose decision was upheld by the Supreme Court) said (at p 313):

In the context of criminal law, the Court possesses the judicial power to try a person for an offence committed by him and to pass sentence against him if he is found guilty.

I **[12]** Now, look at s 97(2). It is clear from its plain reading that Parliament has consigned the power to determine the measure of the sentence that is to be served to the Yang di-Pertuan Agong in the case of an offence committed in any of the Federal Territories and to the Ruler or Governor in the case of the several States of the Federation. By art 39 of our Constitution, the executive authority of the Federation is vested in the Yang di-Pertuan Agong. Save on certain matters that are not in issue

here, the Yang di-Pertuan Agong is a constitutional monarch and must, in accordance with art 40(1), act in accordance with the advice given him by the Cabinet or a particular Minister of the Cabinet. Thus:

> when one finds in the Constitution itself or in a Federal law powers conferred upon the Yang di-Pertuan Agong that are expressed to be exercisable if he is of opinion or is satisfied that a particular state of affair exists or that particular action is necessary, the reference to his opinion or satisfaction is in reality a reference to the collective opinion or satisfaction of the members of the Cabinet, or the opinion or satisfaction of a particular Minister to whom the Cabinet have delegated their authority to give advice upon the matter in question", per Lord Diplock in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50.

[13] In our judgment, applying settled principles, s 97(2) clearly contravenes the doctrine of separation of powers housed in the Constitution by consigning to the Executive the judicial power to determine the measure of the sentence that is to be served by the instant appellant. Section 97(4) does not, in our considered judgment, rescue the second subsection from unconstitutionality. If anything it compounds the problem. For, that subsection does in fact confirm that it is the Yang di-Pertuan Agong who determines the measure of the sentence that is to be served, save that it is a power that is exercised on the advice of a Board of visiting justices. Hence s 97(4) is merely a procedural adjunct to the principal power to determine the measure of the sentence that the appellant is to serve.

[14] There are two short matters that need to be dealt with before we conclude. First, it was pointed out during argument that there may be other statutes, eg, s 348 of the Criminal Procedure Code, which make provision for the detention of persons at the pleasure of the Yang di-Pertuan Agong, or a Ruler or Governor. It was said that striking down s 97(2) may affect those other provisions. With respect, we do not agree. As was pointed out by the Indian Supreme Court in *In re the Special Courts Bill 1978* AIR [1979] SC 478, the constitutionality of a particular provision must be determined in each case as it arises. Our conclusion that s 97(2) is inconsistent with the Constitution does not extend to a declaration of unconstitutionality of other equipollent provisions. The validity of these other provisions must be dealt with on a case by case basis as and when the occasion arises. In the specific case of s 348 of the Criminal Procedure Code, it is a pre-Merdeka and hence a pre-Constitution provision. It must therefore be dealt with in accordance with the principles set out in *Assa Singh v Menteri Besar, Johore* [1969] 2 MLJ 30 which were applied by this court in *Kerajaan Negeri Selangor & Ors v Sagong Tasi* [2005] 6 MLJ 289. In the case of pre-Merdeka statutes, the courts are empowered to 'apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution': *Surinder Singh Kanda v The Federation of Malaya* [1962] MLJ 169, per Lord Denning). We do not have such a power in respect of laws enacted post-Merdeka. In respect of such laws, the only power we have, under art 4(1) of the Constitution is to either uphold them as being intra vires the supreme law or strike them down as being inconsistent with it. Consequently, once a law is found to violate the Constitution the court has no choice but to declare it void and of no effect. So uch for the constitutional ground.

[15] The other point in the case is this. Learned counsel for the appellant when opening his argument said that quite apart from the constitutional argument, there were other grounds in the petition of appeal which he said he would leave on file. This, of course, required the learned deputy who responded to the appeal to argue the merits of the appeal. We must say at once that this was a gruesome murder and that there is abundant material on record to support the conviction of the appellant. The victim in this case was found to have had 20 stab wounds. This clearly points to an intention to kill. There is absolutely no evidence to bring the case within one of exceptions. The learned trial judge admirably dealt with the evidence and drew the proper inferences from it. In our judgment the conviction is therefore entirely safe.

[16] What is to be the upshot? This is a case in which Parliament has provided for the entry of a conviction and passing of sentence but has made no valid law for the measure of sentence. A similar situation arose in *Soon Kim Seng v Public Prosecutor* [1978] 2 MLJ 107. There, the accused was convicted on 3 charges of having in his possession contrivances capable of being used for the purposes of making infringing copies of textbooks the copyrights of which were vested in the complainant. He was sentenced to a fine of $1,500 on each of the three charges. He appealed on the ground that the legislation had not provided for any fine or punishment for the possession of a duplicating contrivance. Chang Min Tat J, in allowing the appeal held, with regret, that Parliament had failed to provide a punishment for the offence in question. He accordingly upheld the conviction but set aside the sentence. We must with like regret follow suit. Here, Parliament has said that the appellant shall not, by reason of his age, receive the capital punishment but has made no valid law conferring power upon the courts to impose some other sentence. We would have been inclined to impose life imprisonment in this case but unfortunately our written law does not contain any equipollent provision that exists under Jamaican law.

[17] For the reasons already given the appeal against conviction is dismissed. However, the sentence passed is set aside. We will now hear arguments on the consequential orders that we should make on this appeal.

[18] In conclusion we must say that this is a tragic case. *Liyanage* and *Hinds* have been in the law reports since 1967 and 1976 respectively. Both have been applied by our courts long before the Child Act was drafted. It is unfortunate that those charged with the drafting of the Child Act did not pay proper attention to the decided cases. If they had done so, the incongruent and unfortunate circumstances now before this court may well have been avoided. But as judges we have to apply the law as it exists. We simply have no choice whatever in the matter.

Appeal dismissed.

Reported by Loo Lai Mee